

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:07-CR-35-1BO
No. 5:12-CV-650-BO

MICHAEL JEROME THOMPSON,)
Petitioner,)
v.)
UNITED STATES OF AMERICA,)
Respondent.

O R D E R

This cause comes before the Court on petitioner's motion for reconsideration and motion for relief from judgment. By order entered January 10, 2013, the Court dismissed petitioner's motion to vacate pursuant to 28 U.S.C. § 2255. Petitioner now asks the Court for the relief sought in his § 2255 motion as he contends he has clearly shown that his Sixth Amendment right to the effective assistance of counsel was violated.

The relief that is requested in petitioner's Rule 60(b) motion is that which would result from a successful motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Thus, the Court re-characterizes it as a § 2255 petition. *United States v. Winestock*, 340 F.3d 200, 206-07 (4th Cir. 2003) ("a motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application" as will "new legal arguments or proffers of additional evidence"); *see also United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998).

The Antiterrorism and Effective Death Penalty Act of 1996 provides that a second or successive petition must be certified by a panel of the appropriate court of appeals to contain either "newly discovered evidence . . . or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §

2255(h)(1)-(2). While “it is settled law that not every numerically second [§ 2255 petition] is ‘second or successive’ within the meaning of the AEDPA,” *In re Williams*, 444 F.3d 233, 235 (4th Cir. 2006), second petitions challenging the same conviction and sentence based on the same arguments proffered in the original motion are deemed to be successive. Absent pre-filing authorization, a district court lacks jurisdiction to consider a second or successive petition.

Winestock, 340 F.3d at 205.

As the instant motion attacks the same conviction and sentence as was earlier challenged by petitioner’s prior § 2255 motion, it is properly construed as a second or successive § 2255 petition and this Court is without jurisdiction to consider it in the absence of pre-filing authorization. Petitioner is not required to receive notice of the Court’s re-characterization of the motion as it has been found to be second or successive. See *United States v. Brown*, 132 F. App’x 430, 431 (4th Cir. 2005) (unpublished).

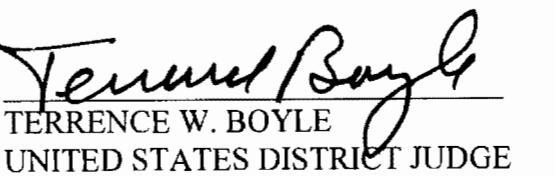
Certificate of Appealability

A certificate of appealability shall not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (2000). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that an assessment of the constitutional claims is debatable and that any dispositive procedural ruling dismissing such claims is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). As reasonable jurists would not find this Court’s dismissal of petitioner’s re-characterized § 2255 motion debatable, a certificate of appealability is DENIED.

CONCLUSION

For the foregoing reasons, petitioner's motion for reconsideration [DE 121] and motion for relief from judgment [DE 122] are DENIED. A certificate of appealability is also DENIED.

SO ORDERED, this 13 day of September, 2013.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE